

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FERNANDO JOSE GONZALES SMITH,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 206778

St. Clair Circuit Court

LC No. 97-001136-FC

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced defendant to four to ten years' imprisonment for the conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting into evidence statements the complainant made to her brother regarding the sexual assault. We disagree. Because defendant failed to object to the testimony at trial, we review this claim only for manifest injustice. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999); *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998); MCL 769.26; MSA 28.1096.

At defendant's preliminary examination, the complainant's older brother, Scott, testified that the complainant approached him on Sunday, a few days after the incident, and asked to talk to him privately. Scott described the complainant as "frightened" and "upset." Scott testified that the complainant told him that when she slept over at her mother's boyfriend's residence a few days ago, defendant pulled down her pants and licked between her legs. The district court admitted this testimony under MRE 803A, the tender years exception, and bound defendant over for trial. At trial, Scott again testified to what the complainant told him concerning the incident. Defendant did not object to the testimony at trial. In its findings of fact, the trial court found both the complainant and Scott to be extremely credible witnesses and noted that the complainant's statement to Scott was made "approximately within 24 hours, or shortly thereafter the occurrence, and it tracks extremely well with the testimony under oath that I heard from [the complainant] herself."

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is generally inadmissible, unless there is an applicable exception under which the statement may be admitted. MRE 802. There is no question that Scott’s testimony relating what the complainant told him about the incident constituted hearsay. Therefore, the dispositive inquiry is whether that testimony falls within any of the recognized hearsay exceptions. We conclude that the challenged testimony was properly admitted under the modified tender years hearsay exception set forth in MRE 803A.<sup>1</sup>

MRE 803A provides in pertinent part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

In this case, the complainant was nine years old when she uttered the statement to Scott describing the sexual conduct committed by defendant. Further, the evidence was undisputed that the complainant approached Scott and initiated the conversation with him during which she made the hearsay statement at issue. There was no evidence that the complainant fabricated the allegation, nor was there any evidence that Scott coerced the complainant to talk or influenced her to accuse defendant of sexual misconduct. To the contrary, the evidence established that Scott had no idea what the complainant was going to say when she approached him, and that the statement was entirely spontaneous. Therefore, we find that the first two elements were satisfied.

With respect to the third element, the record reveals that the complainant made the statement to Scott on Sunday, between twenty-four and thirty-six hours after the incident occurred.<sup>2</sup> A delay in making the declaration may be excusable under certain circumstances. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996) (several day delay in

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<sup>1</sup> MRE 803A became effective March 1, 1991, and codified the Michigan common law hearsay exception known as the tender years rule.

<sup>2</sup> The record was unclear whether the sexual assault occurred late Friday night or early Saturday morning.

reporting sexual abuse by the defendant father was excusable because of complainant's fear of reprisal by the defendant); *People v Hammons*, 210 Mich App 554; 534 NW2d 183 (1995) (eight- or nine- month delay in reporting sexual abuse was excusable on basis of victim's well-grounded fear of the defendant). The evidence showed that the complainant's delay in reporting the incident was caused by a combination of fear and stress. The complainant refused to return to the room in which defendant was located after the incident and decided instead to spend the rest of the night in the room where her mother was sleeping. The complainant also testified that she waited to report what happened because she was "scared." Under the circumstances, we find it was entirely excusable for a nine-year-old girl, who was sexually assaulted in the middle of the night by an individual staying in the same house as her, to wait between twenty-four and thirty-six hours to report the shocking and traumatic experience to her brother. See *Dunham, supra*; *Hammons, supra*.

Finally, the hearsay statement was introduced at trial through the testimony of Scott, the first person to whom the complainant related the statement, and was entirely corroborated by the complainant's own testimony.<sup>3</sup> Accordingly, we conclude that the statement was properly admitted pursuant to MRE 803A.<sup>4</sup>

In a related argument, defendant contends that he received ineffective assistance of counsel at trial by defense counsel's failure to object to the hearsay testimony elicited from the complainant's brother. We disagree.

Defendant failed to move for a new trial or an evidentiary hearing, and thus, our review of this claim is limited to any mistakes apparent on the record. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). The decision whether to object to testimony of a particular witness is generally considered a matter of trial strategy. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). As noted above, we do not find that the admission of the hearsay testimony was improper, thus, an objection at trial was not warranted. Counsel is not required to make a futile or meritless objection. *People v Snider*, 239 Mich 393, 425; 608 NW2d 502 (2000). Rather, counsel's decision not to lodge a hearsay objection to the testimony at trial, after his objection to the testimony at the preliminary examination was overruled, was a matter of sound trial strategy. *Bahoda, supra*. Because defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness, or that but for the alleged error, there was a reasonable likelihood that he

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<sup>3</sup> The complainant testified that she was sleeping on a couch in the living room of her mother's boyfriend's house when she was awakened by defendant licking her private parts with his tongue. Defendant was the boyfriend's roommate at the time of this incident. The complainant testified that she did not immediately tell her mother about the incident because she was scared. She testified that she told her brother about the incident the following day, and she was upset when she told him.

<sup>4</sup> In light of our conclusion that the trial court properly admitted the statement pursuant to MRE 803A, it is unnecessary for us to address defendant's argument that the evidence was inadmissible under MRE 803(2), the excited utterance exception to the hearsay rule.

would have been acquitted, *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1995), his ineffective assistance of counsel claim must fail.

Affirmed.

/s/ Michael J. Kelly

/s/ Helene N. White

/s/ Kurtis T. Wilder